Filed 4/2/10 In re R.V. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re R.V., a Minor	
D.S. et al., Petitioners and Respondents, v. J.V., Objector and Appellant.	F058216 (Super. Ct. No. VPR042387) **OPINION**
Adoption of R.V., a Minor.	
D.S. et al., Plaintiffs and Respondents, v. J.V., Defendant and Appellant.	(Super. Ct. No. VAD006803)

APPEAL from orders of the Superior Court of Tulare County. William Silveira, Jr., Judge. (Retired judge of the Tulare Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

Carol A. Koenig, under appointment by the Court of Appeal, for Objector and Appellant and Defendant and Appellant.

David Minyard for Petitioners and Respondents and Plaintiffs and Respondents.

-ooOoo-

In 2007, Da.S. and A.S. (hereafter collectively guardians or individually guardian mother or guardian father) became the legal guardians of then 22-month-old R.V. (hereafter the child).

In 2008, guardians filed a petition to terminate the parental rights of J.V. (hereafter mother)[1] so they could adopt the child. The family/probate court[2] granted the petition. Mother appeals, arguing the court erred (1) when it failed to inquire of mother whether the child had Native American ancestry as required by the Indian Child Welfare Act of 1978 (ICWA; 25 U.S.C. § 1901 et seq.) and applicable rules of court, (2) because there was not substantial evidence to support the order, and (3) by failing to consider whether counsel should be appointed for the child.

We agree with mother that the court erred in two respects. California Rules of Court, rule 5.481(a)[3] required the court to ask mother whether the child had any Native American ancestry. The failure of *anyone* to make this inquiry requires a limited remand

---

[1]To protect the privacy of the parties, we will refer to them only by their initials. To ease the reader's task, we will refer to the parties as indicated. Our only intention is to make this opinion more easily understood. No disrespect to the parties is intended.

[2]We refer to the lower court as the family/probate court because petitions were filed under both the Family Code and the Probate Code. The lower court treated the petitions as a single action. Therefore, it was sitting as both the family court and the probate court. Hereafter we will refer simply to the court.

[3]All further references to rules are to the California Rules of Court.

of the matter as explained below. The court also erred by failing to consider whether counsel should be appointed for the child. We conclude, however, that this error did not result in a miscarriage of justice. Finally, we reject mother's argument that the order was not supported by substantial evidence. Therefore, our remand will be limited to the question of the child's Native American ancestry.

FACTUAL AND PROCEDURAL SUMMARY

I. Procedural Summary

The sequence of events leading up to the petition to terminate mother's parental rights began in September 2005, four months after the birth of the child. At that time, De.S., the child's maternal great-grandfather, and B.S., the child's step-great-grandmother (hereafter great-grandmother), petitioned the court for guardianship of the child. The petition stated that a guardianship was necessary because mother was incarcerated. The court granted the petition.

In May 2006, mother filed a petition to terminate the guardianship. She withdrew the petition at the scheduled hearing.

In March 2007, guardians[4] filed a petition to be appointed the successor guardians of the child. The petition asserted that great-grandmother's health had deteriorated and she no longer was able to care for the then two-year-old child. Guardians stated they had had custody of the minor since February 2007. Mother consented to the guardianship. The court granted the petition on April 11, 2007. Letters of guardianship issued one day later.

On August 15, 2008, guardians filed two different documents. In the pending guardianship case, they filed a petition to terminate mother's parental rights to the then three-year-old child. In a separate action, they filed a petition to adopt the child. We will

[4]Guardians are the son of step-great-grandmother and son's wife.

refer to the former action as the guardianship action and the latter action as the adoption action. Mother was represented in both actions by the same appointed counsel.

On February 10, 2009, the court dismissed the petition to terminate mother's parental rights that was filed in the guardianship action as the result of a perceived legal defect. On February 11, 2009, guardians filed a petition to terminate mother's parental rights pursuant to Family Code section 7800 et seq. in the adoption action. On March 23, 2009, guardians filed a petition to terminate parental rights pursuant to Probate Code section 1516.5 in the guardianship action.

Although we did not find in the record an order consolidating the actions, the court rendered a single judgment in both actions, which had the effect of consolidating both case No. VPR042387 and case No. VAD006803. Trial on both petitions was held on June 10, 2009.

II. Testimony

The court heard testimony from mother, each guardian, and the child's therapist. In addition, it had before it the report of the social services agency that was prepared for the hearing. This report concluded that mother's parental rights should be terminated so the child could be adopted by guardians.

A. Guardian Mother

Guardian mother met mother when the child was approximately three months old. Guardians were asked to come to great-grandmother's house to meet the child and mother. Mother stated she was probably going to be taken into custody and she asked guardians to take care of the child while she was in custody. Guardians declined because the child's age would have required guardian mother to quit her job.

When mother was taken into custody, the child went to the maternal grandmother, and then a few days later was placed with great-grandmother. Great-grandmother cared for the child for 17 months.

The next relevant event occurred when great-grandmother began having difficulty with the child because of health issues and the increasing activity level of the child. Guardians agreed to pay the cost of placing the child in part-time daycare to assist great-grandmother. In addition, guardians took care of the child on some weekends and some evenings.

In February 2007, great-grandmother became ill and was admitted to the hospital. Great-grandmother asked guardians to care for the child at that time. Guardians agreed, with the intent of helping great-grandmother while she was ill. It soon became evident, however, that great-grandmother's health would not allow her to care for the child. Accordingly, guardians petitioned to be appointed the guardians of the child.

Guardian mother sought out and met with mother regarding the change in guardianship in March 2007. Mother consented to the change after discussing the matter with guardian mother. Mother did not ask to see the child during this meeting. Mother told guardian mother that she was homeless and her life was very difficult. Mother stated she could not care for the child.

After taking custody of the child, guardian mother became concerned with the child's behavior. She called a mental health provider to have the child evaluated. The primary problems were the child's refusal to bond with guardian mother and the child's lengthy fits of rage. The child and guardian mother attended numerous counseling sessions. In addition, guardian mother read books on the child's diagnosis and attended a class related to the diagnosis. The goal was to assist the child in healing. The child did very well.

On at least three occasions, mother asked guardians to adopt the child. Mother has not had any contact with the child since February 25, 2007. Nor has mother provided any support for the child, although she never has been asked for support. Mother requested to visit with the child on one occasion. A meeting was scheduled in May 2007. Mother failed to attend the meeting.

In August 2008, mother requested a "reunification" visit with the child. Guardian mother stated she would check with the child's therapist and determine if such a visit would be in the child's best interests. Mother called the next evening and asked if guardian mother had talked to the therapist. Guardian mother said she had not, but would do so the next week during a regularly scheduled therapy session. Mother then asked if she could take the child to a birthday party. Guardian mother refused because she had not spoken to the therapist. Mother never called to ask to speak to the child. Guardian mother denied that she desired to keep the child away from mother.

B. Guardian Father

Guardian father confirmed guardian mother's testimony. Mother initially asked guardians to adopt the child in 2005 before mother was incarcerated but changed her mind and decided she wanted custody of the child when she was released. Guardian father also confirmed that his mother, great-grandmother, became very sick while caring for the child and asked guardians for their assistance with the child while she recovered. Guardians sought a change in guardianship when it was apparent great-grandmother no longer could care for the child and to ensure the child was covered by medical insurance. To the best of guardian father's knowledge, mother has not had any contact with the child since the change in guardianship.

C. Constance M. Treis

Constance M. Treis is a marriage and family therapist. She began treating the child in April 2008. The child was diagnosed by a psychologist as experiencing reactive attachment disorder as a result of neglect or mal treatment. The child received therapy and guardians were provided with guidance on how to deal with the child when she acted out. The child did very well and regular therapy was not required. At the time of the hearing, Treis saw the child approximately one time per month. Treis believed it would be in the best interests of the child that she remain in the care and custody of guardians.

D. Mother

Mother explained her living arrangement at the time of the hearing, as well as her past living arrangements. She lived with her fiancé. At the time of the hearing, mother and fiancé were both unemployed and she was receiving assistance from the state. The fiancé had a criminal record, including child neglect and spousal abuse. Mother and fiancé had disputes that resulted in the police responding to the scene.

Mother explained her experiences in drug court and with recovering from drug addiction. She graduated from drug court in 2007.

Mother admitted talking with guardians about adopting the child. Mother explained she was concerned about the child being placed in foster care. Mother had been a ward of the state from the age of two years until she was 18 years old. She did not want the child to go through that experience, so she considered putting her up for adoption.

Mother admitted she filed a motion to terminate the guardianship while great-grandmother was the guardian of the child. At the time of filing the motion, she had planned to move out of state. She learned, however, that the court would not allow her to do so while she was on probation, so she withdrew the motion. Mother did not file any other motions to terminate the guardianship.

Mother saw the child on a regular basis while she was in a drug recovery home because great-grandmother would bring the child to visit on visiting days. After mother left the recovery home, she would visit the child frequently at great-grandmother's house.

Mother admitted she was approached by guardian mother about guardians petitioning to become the guardians of the child because of great-grandmother's deteriorating health. Mother agreed to the change in guardianship because it was in the best interests of the child.

The last time mother saw the child was approximately December 2006. Mother admitted arranging to meet with guardians and the child in May 2007, but she missed the

visit because she was unable to arrange transportation. Mother also knew she could petition the court to end the guardianship, but did not do so. Mother made several calls to guardians, but she did not speak with the child, nor did she make further attempts to visit the child. The last phone conversation with guardians was in August 2008, when mother asked to visit the child. Guardian mother stated that the child was in therapy and she would need to speak to the therapist before she would consent to a visit.

Mother was employed for a period of 14 months during 2006 and 2007. She was earning close to minimum wage. She has not been employed since November 2007, even though she sought employment. She was pregnant during this time period and believes that employers did not want to hire her because of the pregnancy.

III. Court Ruling

The court heard argument and then granted the petition filed pursuant to Probate Code section 1516.5 and the petition filed pursuant to Family Code section 7822. The court concluded that the statutory elements were present, mother had the intent to abandon the child, and the best interests of the child would be served if parental rights were terminated and guardians were allowed to adopt the child.

DISCUSSION

I. Compliance with ICWA

Mother argues that the court failed to comply with the requirements of ICWA.

> "Congress passed the ICWA in 1978 'to promote the stability and security of Indian tribes and families by establishing minimum standards for removal of Indian children from their families and placement of such children "in foster or adoptive homes which will reflect the unique values of Indian culture ...."' [Citation.]
>
> "The ICWA's procedural and substantive requirements must be followed in involuntary child custody proceedings when an 'Indian child' is involved. An 'Indian child' is defined by the ICWA as 'any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.' [Citation.]

> "Among the procedural safeguards included in the ICWA is the provision for notice. The ICWA provides, in part: 'In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary [of the Interior] in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe....' [Citation.] 'Notice shall be sent whenever there is reason to believe the child may be an Indian child, and for every hearing thereafter unless and until it is determined that the child is not an Indian child.' [Citation.]" (*In re O.K.* (2003) 106 Cal.App.4th 152, 155-156.)

As this court explained in *In re J.N.* (2006) 138 Cal.App.4th 450, the rules of court establish a duty to inquire of the parents of a minor. Rule 5.481(a) provides that in cases such as this the court, county welfare agency, court-connected investigator, and the party seeking guardianship of the minor "have an affirmative and continuing duty to inquire whether a child is or may be an Indian child …." (*Ibid.*) At the parent's first appearance, "the court must order the parent … to complete *Parental Notification of Indian Status* (form ICWA-020)." (Rule 5.481(a)(2).)

The form petition to be appointed guardians filed by great-grandparents (Judicial Council of Cal. form GC-210) (rev. Jan. 1, 2001) had a box checked that stated the child did not have Native American ancestry. The same form was used by guardians when they sought to be appointed the guardians for the child. One attachment to the petition stated that the child did not have Native American ancestry.

These were the only two references in the record to the question of whether the child had Native American ancestry. Mother never was ordered to complete a parental notification of Indian status form. The court did not inquire of mother or her counsel at any hearing whether the child had Native American ancestry. The social worker's report did not reflect an inquiry into the question of whether the child had Native American

ancestry. In other words, the record indicates that mother never was asked about the possibility that the child may have Native American ancestry. Also, there was no evidence in the record that would allow us to make a prejudice determination under a harmless error analysis. We will not speculate. We will remand that matter to permit the court to conduct the inquiry it should have conducted at the inception of the case. (*In re J.N., supra,* 138 Cal.App.4th at p. 461.)

II. Sufficiency of the Evidence

Mother contends that the order was not supported by substantial evidence. In determining whether substantial evidence supports the judgment, we review the entire record in the light most favorable to the judgment. (*In re Angelia P.* (1981) 28 Cal.3d 908, 924.) We determine whether there was evidence that was reasonable, credible, and of solid value so that the trier of fact could conclude that it was appropriate to terminate mother's parental rights. (*Ibid.*) We presume the trier of fact found every fact that reasonably could have been deduced from the evidence. (*People v. Boyer* (2006) 38 Cal.4th 412, 480.)

Mother argues the evidence was insufficient on three of the elements that must be found before parental rights may be terminated under Family Code section 7822 (failure to support the child, intent to abandon, leaving the child with another). We need not dwell on this argument because mother completely ignores the court's determination that termination of parental rights was appropriate under Family Code section 7822 *and* Probate Code section 1516.5.

Probate Code section 1516.5 permits the termination of parental rights if (1) it is established that the guardianship continued for at least two years, and (2) the probate court determines that it is in the minor's best interests that he or she be adopted by the guardian. (*Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1118.) The court made the required findings in this case. Mother does not attack these findings and, even if she had,

we would reject the challenge for the findings are amply supported by the record. We simply note that the length of the guardianship was established and that mother has had virtually no contact with the child since guardians were given custody. Mother has not provided any support for the child and lives with her boyfriend, who has a record of domestic violence and child abuse/neglect. Guardians have (1) accepted the child into their home, (2) provided for the child's needs, (3) obtained counseling for the child to address problems associated with her chaotic childhood, and (4) provided the stability that mother cannot provide. Guardians have grown to love the child and want to adopt her. These facts, and many more, confirm that there was sufficient evidence to establish that it was in the child's best interests to have mother's parental rights terminated, thus allowing guardians to adopt the child.

Since sufficient evidence supports the termination of mother's parental rights pursuant to Probate Code section 1516.5, whether there was sufficient evidence to terminate mother's parental rights pursuant to Family Code section 7822 is irrelevant. Even if the evidence was insufficient under the requirements of the Family Code, mother's parental rights still would be terminated.

III. Appointment of Counsel for the Child

Family Code section 7861 requires the court to "consider whether the interests of the child require the appointment of counsel." While the court has discretion in deciding whether to appoint counsel for the minor, the court "'*must* exercise its discretion.'" (Italics added.) (*Adoption of Jacob C.* (1994) 25 Cal.App.4th 617, 625.) If the record does not demonstrate that the court exercised its discretion, error has occurred. (*In re Richard E.* (1978) 21 Cal.3d 349, 354.) Reversal is required, however, only if the error has resulted in a miscarriage of justice. (*Ibid*.) A miscarriage of justice occurs only if we conclude, after examining the entire cause, that it is reasonably probable the appellant

would have obtained a more favorable result if the error had not occurred. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

The record does not indicate that the court ever considered the question of whether counsel should be appointed for the child. Therefore, the court erred in failing to exercise its discretion.

Reversal is not required, however, because there is no possibility that mother would have achieved a better result had counsel been appointed for the minor. The child was an infant, far too young to express any opinion about whether mother's parental rights should be terminated. Indeed, the child, except for the first three months of her life, has had extremely limited contact with mother. The only parents the child has known are the guardians.

This is a case, moreover, where each party was represented by counsel and attempted to convince the court that the best interests of the child required that mother's parental rights should, or should not, be terminated. The record does not suggest there was anything independent counsel could have done to protect the child's interests or to change the outcome of the hearing. The court had full knowledge of the relationships between the child and the various family members. We are not aware of any facts that could have changed the result if they had been brought to the court's attention.

Mother argues that counsel should have been appointed because this was a contested proceeding. That the proceeding was contested, however, ensured that all relevant facts were brought to the court's attention before it made its decision.

Mother also argues a letter sent by the child's maternal aunt that suggested great-grandmother and guardians had always planned to have guardians adopt the child is significant. This evidence, however, was contained in the court's file, and thus before the court. Moreover, we fail to see how this alleged conspiracy somehow controlled mother's actions, or inactions, in dealing with the child.

Finally, mother argues the thwarted visitation attempts required that counsel be appointed for the minor. The record indicates, however, that mother requested a visit with the child on only two occasions. Arrangements were made for mother to visit with the child on one occasion, but mother failed to attend because of transportation issues. The second request occurred when the child was in therapy and guardian mother refused to allow any contact until she spoke with the child's therapist. The petition to terminate parental rights was filed shortly thereafter. This information was before the court. We cannot conceive how appointing an attorney for the child would have influenced this undisputed testimony.

DISPOSITION

The order granting the petitions is vacated. The matter is remanded to the court with directions to inquire of mother whether the child is or may be an Indian child within the meaning of ICWA. If the inquiry produces evidence that the child is, or may be, an Indian child, then the court should direct the appropriate agency to give notice of the underlying proceedings and any upcoming hearings in compliance with ICWA to the Bureau of Indian Affairs (BIA) and any identified tribes. (25 U.S.C. § 1912.) The agency shall document its efforts to provide such notice by filing such documentation and any and all responses received with the court. (Rule 5.482(b).) If the BIA or any tribe responds by confirming the child is or may be eligible for membership within 60 days of sending proper notice under ICWA to the BIA and any identified tribes (Rule 5.482(c)), the court shall proceed pursuant to the terms of ICWA. If the inquiry of mother produces no evidence that the child is or may be an Indian child, or there is no confirmation that

the child is or may be eligible for Indian tribal membership, the court shall reinstate the prior order. In all other respects the order is affirmed. No costs are awarded to either party.

_____
CORNELL, Acting P.J.

WE CONCUR:

_____
GOMES, J.

_____
KANE, J.